

STATE OF MICHIGAN  
COURT OF APPEALS

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MICHAEL A. DEGREGORY,

Plaintiff-Appellant,

v

TIMOTHY A. SMITH and ANDREW F. SMITH,

Defendants-Appellees.

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UNPUBLISHED  
October 21, 1997

No. 197642  
Oakland Circuit Court  
LC No. 94-486022-NI

Before: Corrigan, C.J., and Griffin and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of no cause of action following a jury trial in this negligence suit, arising out of a collision between plaintiff's truck and a car driven by defendant Timothy Smith. We affirm.

Plaintiff first argues that the trial court abused its discretion in refusing to admit evidence that Trooper Jory Huggins issued a citation for careless driving to defendant Timothy Smith following the accident. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Phinney v Perlmutter*, 222 Mich App 513; 564 NW2d 532 (1997). Evidence of the issuance of a traffic ticket may not be admitted to establish negligence. *Kirby v Larson*, 400 Mich 585, 598-599; 256 NW2d 400 (1977), overruled in part on other grounds by *Placek v Sterling Heights*, 405 Mich 638; 275 NW2d 511 (1979). Thus, the trial court properly excluded evidence of the citation. Moreover, plaintiff does not provide any evidence in support of his contention that the jury believed that Trooper Huggins was not credible because he did not issue a citation to defendant. In fact, the jury had no indication whether Trooper Huggins did or did not issue a citation. Accordingly, the trial court did not abuse its discretion in refusing to admit evidence that Trooper Huggins issued a citation to defendant.

Plaintiff next argues that the trial court abused its discretion in giving a curative instruction to the jury regarding the issuance of a citation. Although the trial judge indicated that he would give a curative instruction, a review of the record reveals that the instruction was in fact never given. Therefore, the

issue is not preserved. *Vugterveen Systems, Inc v Olde Millpond Corp*, 210 Mich App 34, 38; 533 NW2d 320 (1995).

Plaintiff next argues that the trial court abused its discretion in excluding evidence of his 1994 tax returns because his failure to provide those documents in response to defendants' interrogatory request did not amount to a knowing concealment. This Court reviews for an abuse of discretion the decision whether to impose sanctions for discovery violations, including the exclusion of evidence. *Beach v State Farm Mutual Automobile Ins Co*, 216 Mich App 612, 618; 550 NW2d 580 (1996). Because plaintiff did not provide a copy of his wage records until the first day of trial, we do not believe that the trial court abused its discretion in refusing to admit those documents into evidence. Moreover, even if the trial court had erred, any error was harmless as the omitted facts were established by other evidence. MCR 2.613(A). Plaintiff was allowed to introduce evidence of his 1994 and 1995 wages through his own testimony. In addition, because the jury found that defendant Timothy Smith was not negligent, the issue of plaintiff's damages was not relevant to any matter.

Plaintiff next argues that the court erroneously failed to give an instruction to the jury following defense counsel's question regarding the "records of Continental Contracting." However, plaintiff did not request a curative instruction at trial. Relief will not be granted where a party did not request a limiting instruction at trial and where the likelihood of prejudice resulting from the instruction's absence was not shown. *City of Westland v Okopski*, 208 Mich App 66, 73; 527 NW2d 780 (1994). We do not believe that defense counsel's question could have been understood by the jury in a way to cause prejudice. The jury did not likely know that the question involved the issue that plaintiff did not produce his 1994 wage records as requested by defendants. Therefore, because plaintiff did not request a curative instruction and because he failed to demonstrate that he was prejudiced by defense counsel's question, the trial court did not err in failing to sua sponte give an instruction to the jury.

Plaintiff next argues that the trial court's instruction regarding spoliation of evidence was improper because it gave the jury the impression that he intentionally destroyed evidence and was slanted in defendants' favor. The determination whether an instruction is accurate and applicable to a case is in the sound discretion of the trial court. *Luidens v Sixty-Third District Court*, 219 Mich App 24, 27; 555 NW2d 709 (1996). There is no error requiring reversal if, on balance, the theories and the applicable law were adequately and fairly presented to the jury. *Id.*

Generally, where a party destroys evidence, or fails to produce it, courts presume that the evidence would operate against the party who destroyed it or failed to produce it. *Hamann v Ridge Tool Co*, 213 Mich App 252, 255, 258; 539 NW2d 753 (1995). It would be unfair to permit the negligent party to benefit from his own error. *Id.* at 258. Whether the evidence was destroyed or lost accidentally or in bad faith is irrelevant, because the opposing party suffered the same prejudice; specifically, the inability to challenge the evidence or respond to it. *Id.*

After the accident, plaintiff apparently purchased the damaged paint truck from his insurer because he needed it to maintain his business. Plaintiff attempted to salvage parts of the truck by incorporating portions of it into another vehicle. Therefore, we believe that the trial court properly gave the jury an instruction that plaintiff had control of the paint truck after the accident and disposed of it

before defendants had an opportunity to examine it and that the evidence could be presumed to have been adverse to him. *Hamann, supra* at 255, 258.

Moreover, plaintiff knew that the court intended to give the jury an instruction regarding spoilage of evidence at the beginning of trial. There was nothing to prevent plaintiff from explaining on direct examination when and why he disposed of the truck. Thus, plaintiff's claim that he was prejudiced because he did not know the content of the instruction or when it would be given is meritless. Accordingly, the trial court did not abuse its discretion in instructing the jury that plaintiff disposed of the paint truck and they could presume that evidence would have been adverse to him.

Plaintiff next argues that the trial court abused its discretion in refusing the jury's request to provide them with transcripts of the parties' testimony. The trial court's refusal of a jury's request to be provided with transcripts is within the trial court's discretion. *People v Crowell*, 186 Mich App 505, 508; 465 NW2d 10 (1990), remanded on other grounds 437 Mich 1004 (1991); see also *Klein v Wagenheim*, 379 Mich 558, 561; 153 NW2d 663 (1967); *Federoff v Meyer Weingarden & Sons, Inc*, 60 Mich App 382, 388-389; 231 NW2d 417 (1975). We do not believe the trial court abused its discretion in offering to have the testimony read to the jury as opposed to giving them a copy of the transcript. Moreover, there is no indication that the jury rushed to a decision because they did not wish to hear the testimony read. In addition, plaintiff offers no authority to support his claim that the court should have questioned the jury about how quickly they reached a verdict and told them that they should rehear the parties' testimony and only relevant portions would be read. Accordingly, the trial court did not abuse its discretion in offering to have the parties' testimony read to the jury as opposed to providing the jury with a copy of the transcripts.

Finally, plaintiff argues that the trial court abused its discretion in denying his motion for a new trial because the jury's verdict that defendant Timothy Smith was not negligent was against the great weight of the evidence. This Court applies an abuse of discretion standard to a trial court's ruling on a motion for a new trial on the ground that the verdict was against the great weight of the evidence. *Bordeaux v Celotex Corp*, 203 Mich App 158, 170; 511 NW2d 899 (1993). A new trial may be granted if a verdict is against the great weight of the evidence or contrary to law, or if an error of law has occurred in the proceedings. MCR 2.611(A)(1)(e) and (g). *Constantineau v DCI Food Equipment, Inc*, 195 Mich App 511, 514; 491 NW2d 262 (1992). A trial court's determination that a verdict is not against the great weight of the evidence will be given substantial deference by the appellate court. It is incumbent upon a reviewing court to engage in an in-depth analysis of the record on appeal. *Arrington v Detroit Osteopathic Hosp*, 196 Mich App 544, 560; 493 NW2d 492 (1992). The question whether a verdict is against the great weight of the evidence generally involves issues of credibility or circumstantial evidence, and it is for the jury to decide what weight it should assess to witness testimony. *In Re Robinson*, 180 Mich App 454, 463-464; 447 NW2d 765 (1989).

Plaintiff testified that the accident occurred as a result of defendant Timothy Smith swerving into his lane and hitting his left front tire. Plaintiff's wheel turned and as a result of his correcting the turn, his truck rolled over. Plaintiff also presented the testimony of Trooper Jory Huggins, who opined that defendant Timothy Smith committed the hazardous activity of careless driving and caused the accident. However, Timothy Smith denied that he swerved into plaintiff's lane and instead, testified that plaintiff

moved into his lane and that this movement caused him to apply his brakes and lose traction in the rear of his car. The vehicles then locked in the back and caused both cars to spin or roll. Defendants also presented the testimony of Aaron Woryn who stated that Timothy Smith did not move into plaintiff's lane and that the rear of the vehicles collided. Defendants also presented the testimony of James Varin, who was an expert in accident reconstruction. Varin stated that it was not possible for the accident to have occurred the way plaintiff alleged that it did. Finally, defendants presented the testimony of James Vallente, who testified that plaintiff was involved in a heated argument with his brother over the radio moments before the accident.

Therefore, the determination whether Timothy Smith was negligent was based on issues of credibility. It was for the jury to decide what weight it should assess to each witness' testimony. *In re Robinson, supra* at 463-464. Because there was competent evidence to support the jury's determination that Timothy Smith was not negligent, the jury's verdict was not against the great weight of the evidence. Accordingly, the trial court did not abuse its discretion in denying plaintiff's motion for a new trial.

Affirmed.

/s/ Maura D. Corrigan  
/s/ Richard Allen Griffin  
/s/ Joel P. Hoekstra